In the Matter of the Arbitration Between:	)	CSMCS No. 00-0-000
UTOPIA POLICE OFFICERS' ASSOCIATION,	)	
Union,	)	Grievance of John Cop [1] (Appellant)
and	)	
CITY OF UTOPIA,	)	
Employer.	)	**OPINION AND AWARD**

Hearing Dates: Four Hearing Days
Hearing Location: Utopia, California
Date of Award: 1999

JOHN B. LAROCCO
Arbitrator
2001 H Street
Sacramento, California 95814-3109

APPEARANCES

For the Association

Joe Smith
Attorney at Law
Utopia, California

For the City

Jane Green
Attorney at Law
Utopia, California

1 **All names and locations have been changed to protect the innocent and the guilty.**

OPINION

INTRODUCTION

On November 12, 1997, the City of Utopia Police Department (City, Department or Employer) terminated Police Officer John Cop (Appellant) for allegedly committing dishonesty, insubordination and conduct unbecoming a police officer arising out of Appellant's interaction with three citizens: Beth Brown, Vera Violet and Patty Pink.[2] [Employer Exhibit 10] Thereafter, the Utopia Police Officers' Association (Union or Association) progressed a grievance appealing Appellant's discharge to arbitration for a decision on its merits. The parties selected the undersigned as Arbitrator from a list supplied by the California State Mediation and Conciliation Service. At the hearings held on four days, the parties proffered extensive documentary and testimonial evidence.

At the commencement of the hearing, the parties stipulated that the issue is: Was Appellant terminated for just cause, and if not, what is the appropriate remedy? [TR 6]

At the conclusion of the hearing, the parties opted to file post-hearing briefs in lieu of closing oral argument. The Arbitrator received the briefs on or about 1999 and the matter was deemed submitted.

BACKGROUND AND SUMMARY OF THE FACTS

Appellant's History with the Department

The Department hired Appellant.[3] [TR 466-467, 537] At the onset of his employment, Appellant acknowledged receiving a copy of the City's personnel policies which addressed, in Section C1., conflicts of interest:

> Employees of the City are expected to maintain the highest standard of ethical conduct and to avoid conflicts of interest. Management and supervisory employees should be especially alert to avoid working relationships between related employees which may give rise to conflicts of interest or which may place the employees in an untenable situation in the event irregularities occur.
>
> Some examples of violations:
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> C1. When an employee's personal interest or course of conduct in relation to outside interest is such as to affect such an employee's independence of judgment in discharging responsibilities on behalf of the City. [Employer Exhibits 11 and 19]

Over the years, Appellant received several commendations including seven complimentary citizen letters and three Department citations. In addition, the Department

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2 **The Arbitrator dismissed the charges surrounding the Patty Pink incident for want of proof. The City maintains that Appellant's termination is justified if he committed misconduct during his contacts with either Brown or Violet.**

3 **Appellant holds a Bachelor's degree from the University of Utopia. [TR 537]**

commended Appellant for donating his time to the community. [Association Exhibit 7]

The Department discharged Appellant for purportedly being dishonest, insubordinate and neglecting his duties. Prior to the discharge, the City had warned Appellant about improperly fraternizing with women while on-duty. Lieutenant Leroy Mauve wrote a memorandum to Appellant enumerating seven incidents where Appellant, while he was on-duty, allegedly stopped women drivers for various violations solely so that Appellant could make contact with the driver. [Employer Exhibit 1] Appellant denied the allegations asserting that the traffic stops were for legitimate law enforcement purposes. Nevertheless, Lieutenant. Mauve warned Appellant, in his memo, that any officer making traffic stops to meet females would face immediate disciplinary action because the officer is misusing his position. Mauve "instructed" Appellant to seek out a supervisor for advice whenever he encountered a "questionable situation involving a female" or where Appellant's conduct raised even a "hint" of impropriety. [Employer Exhibit 1] Appellant acknowledged that Mauve cautioned him to be careful and he realized that he was to consult a supervisor after a questionable contact with a woman to protect himself (Appellant) against false accusations. [TR 556] The City's termination of Appellant was predicated on alleged misconduct which was similar, but not identical, to the allegations covered by Mauve's memo.

The Association appealed Appellant's discharge to binding arbitration. In a decision, Arbitrator Ronald McDonald ordered the Department to reinstate Appellant to service but without pay for time lost. [Employer Exhibit 4] Finding that the City had just cause to discipline Appellant, Arbitrator McDonald wrote the following summary of Appellant's misdeeds.[4]

> The evidence here shows that in various situations, grievant failed to properly report his position to dispatch;-exposed a civilian to significant potential danger without a waiver of liability; failed to properly handle a domestic violence call, increasing potential future exposure to the victim; was dishonest to his superiors in claiming that Griffin had asked for extra patrol checks and in reporting his position during a December 1993 stolen vehicle call; and committed at least a technical violation of state law in allowing Griffin to read a confidential police report. He did so in each case with full knowledge of requirements to the contrary in Department regulations, and shortly after having been counselled by his supervisors in several of these areas. In at least two of those situations, his actions and his violations of required duties exposed the City to potentially significant civil liability - a liability that would increase geometrically should grievant be involved in similar actions in the future. [Employer Exhibit 4, pp.42-43]

Arbitrator McDonald exonerated Appellant of stopping vehicles with female drivers with the specific intent to make contact with the women.

In his Opinion, Arbitrator McDonald gave Appellant what can best be described as a final warning. Arbitrator McDonald wrote:

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4 **In reaching his decision that Appellant committed insubordination, dishonesty and neglect of duty, Arbitrator McDonald specifically found significant problems with Appellant's credibility. [Employer Exhibit 4]**

> The arbitrator is hopeful that the severe disciplinary suspension ordered here will convince grievant of the serious error of many of his actions and the strong need never to engage- [sic] in such actions in the future. In my view, the strong message inherent in the disciplinary suspension ordered in this decision and [sic] should make clear to grievant that further violations of Department policies and laws along the same lines would likely be viewed as cause for discharge in any subsequent proceedings. [Employer Exhibit 4; p.43] [Emphasis in the text.]

Appellant related that he understood Arbitrator McDonald's warning to mean that he was required to separate his work activities from his personal life and that he was specifically forbidden from asking a woman out while he was on-duty. [TR 470, 473]

In compliance with Arbitrator McDonald's decision, the City reinstated Appellant to the position of police officer. [TR 302] Police Chief Randall Blue testified that, when the Department reinstated Appellant, he told Appellant that the citizens expect absolute honesty from its police officers. [TR 304]

In a memorandum, Lieutenant Colin Watermelon reviewed two instances where Appellant ostensibly made improper traffic stops. He then issued Appellant some instructions.[5] In his memorandum, Watermelon related that Appellant began a romantic relationship with a woman that he had stopped for driving an unregistered vehicle. Because Appellant did not issue the woman a citation, Watermelon implied that Appellant stopped the woman solely to contact her with the intent to initiate a relationship. According to Watermelon, Appellant said that they only went on one date, a double date, which was arranged while Appellant was off-duty. [TR 578-579] Watermelon wrote in his memo that Appellant purportedly stopped a woman for speeding in a restaurant parking lot without issuing her a citation. As a result of these incidents, Watermelon cautioned Appellant about making contact with women while on-duty and later developing off-duty contacts. Appellant implied to Watermelon that his conduct (surrounding the woman with the unregistered vehicle) was not covered by Mauve's instructions since he did not ask the woman for a date while on-duty. Therefore, Watermelon directed Appellant to contact a supervisor whenever Appellant had ". . . any doubt whatsoever regarding a contact with a female, especially if it turned into a dating relationship . . . .." Watermelon also instructed Appellant that whenever he made an on-duty contact with a female, he must act ". . . businesslike and professional." [Employer Exhibit 5]

On the witness stand, Watermelon elaborated on the contents of his memo. Watermelon was careful to note that the Department did not bar Appellant from dating women but simply instructed him to report these relationships to a supervisor when the initial contact with the woman occurred when Appellant was on-duty. [TR 709] Watermelon recalled that Appellant asked him, "What if a girl asked me out," and Watermelon said, "Same thing." In other words, Appellant must still report the relationship to a superior. [TR 709]

Appellant testified that he understood that if an on-duty contact with a woman led to a dating relationship, then he must report the relationship to his supervisor. [TR 474] Appellant

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5 **In addition, Lt. Watermelon reminded Appellant of Lt. Mauve's instructions before his discharge and subsequent reinstatement. [Employer Exhibit 5]**

defined a dating relationship as ". . . going out with someone and you start to build that relationship up to go more than just being friends."[6] [TR 474] Appellant explained that going out with a woman does not necessarily constitute a "date." [TR 556] Appellant stated: "I have friends that I don't consider myself that I date. You know, we sometimes get together. We sometimes do things together but, to me, they're just friends; it's not a dating situation." [TR 475] Although Appellant understood Watermelon's directives, he never considered them direct orders. [TR 583] Appellant took Watermelon's admonitions as advice and counseling. [TR 678] Thus, Appellant concluded that he need not be concerned about on-duty contacts with women so long as he did not stop a woman for the purpose of meeting her. [TR 696]

Watermelon defined a date as a prearranged socialization or a "meeting." [TR 706, 731] Watermelon acknowledged that he did not tell Appellant what he meant by the words "dating relationship" in his memorandum. [TR 731, 733; Employer Exhibit 5]

Later, the Department served Appellant with two separate, written reprimands. The Department reprimanded Appellant for improperly introducing a ride along citizen as a police investigator and for failing to promptly prepare a police report. [Employer Exhibits 7 and 8]

Beth Brown

Beth Brown, a young, attractive woman, and Appellant gave similar renditions concerning a traffic stop.

As she was traveling down Fantasy Street in Utopia between 5:00 p.m. and 6:00 p.m., Brown noticed a police cruiser following behind her. [TR 92-93] The cruiser then pulled alongside Brown's vehicle, then in front of her vehicle and, by the time she turned onto Goodness Avenue, the patrol cruiser was again behind Brown. [TR 93, 95, 589] Brown remembered the police car's lights were illuminated and then she pulled over to the curb. [TR 95]

Appellant concurred that he drove behind, beside and in front of Brown's car for one and one-half miles. He denied pulling her over to meet her or because she was attractive. [TR 592, 617] Instead, Appellant recounted that when he pulled in front of Brown's vehicle, he observed through his rearview mirror that her vehicle did not have a front license plate.

After stopping Brown, Appellant walked to the passenger side front window and told Brown that he stopped her because her vehicle lacked a front license plate. [TR 97, 496] Simultaneously, Appellant observed an empty beer bottle in Brown's automobile. [TR 97, 497] Appellant related that although Brown denied drinking, he administered the Romberg's sobriety test to her because her eyes were red and he smelled the odor of alcohol on her breath. [TR 497-498] Appellant concluded that Brown was not under the influence of alcoholic beverages.[7] [TR 498]

Appellant directed Brown to procure new license plates from the Department of Motor Vehicles (DMV) because her front plate could have been stolen and used for criminal activity. [TR 98, 498-499] Appellant declared that he did not issue Brown a ticket because she evinced

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6 **In Appellant's mind, dating entails "intimacy." [TR 475]**

7 **Brown did not specifically testify about the sobriety test but she stated that Appellant appeared to be checking her out to ascertain if she had been drinking. [TR 123] Brown declared that her perfume smelled like alcohol. [TR 123] Brown elaborated that the beer bottle had been in her car "for days." [TR 98]**

concern about fixing her license plate and she had to endure the sobriety test.[8] [TR 498, 594, 598] Appellant claimed that giving Brown a fix-it ticket never crossed his mind. [TR 599-600] Appellant acknowledged that, absent some sort of citation, there was not any official record of the traffic stop.[9] [TR 598]

Although he did not issue her any type of ticket, Appellant tendered Brown his business card.[1] [TR 99, 499] Appellant testified that he could not recall why he gave Brown his business card because he normally does not ask the driver to call him once a license plate is fixed. [TR 499, 509] In a subsequent Internal Affairs interview, Appellant suggested that Brown may have offered to call him after she obtained new plates from DMV and so, he gave her his card. [TR 508; Employer Exhibit 23] On the other hand, Brown testified that Appellant directed her to call him to inform him how she fared with DMV. [TR 101] Brown emphasized that Appellant was professional throughout the traffic stop. [TR 98]

Brown obtained new license plates from DMV but she discovered that she was unable to fasten a plate to the front of her car. [TR 103]

Brown recalled that, one evening about two weeks after the traffic stop, she called Appellant at the station and left a message for him. [TR 102] Appellant remembered that he actually spoke with Brown and asked her to call him later inasmuch as he was on-duty. [TR 503] According to Appellant, Brown later called him at the station. He claimed he was off-duty.[11] [TR 503-505]

The telephone conversation was lengthy.[12] Appellant and Brown concur that, after Brown told Appellant that she had obtained new license plates, the remainder of the conversation was devoted to personal matters. [TR 106, 110, 505] Brown related that they talked about their marital status (Brown was single and Appellant was divorced) and she flirted with Appellant. [TR 108-110] Appellant testified that he told Brown that he was uncomfortable asking her out since he had met her while on-duty. Therefore, he said ". . . I can't ask you out, but if you ask me out it's okay." [TR 605] Brown recounted that when Appellant said that he could not ask her out since he had pulled her over for a traffic stop, Brown said ". . . what if I ask you out?" [TR 111] She did and Appellant accepted. [TR 111]

Brown invited Appellant to her home after work one evening to watch television and to speak to Brown's roommate who was evidently interested in law enforcement. [TR 111, 516] Brown called her invitation a date. [TR 110]

Appellant claimed that he did not consider the invitation to be a date inasmuch as Brown had told him during their lengthy telephone conversation that she was not ready for a dating

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8 **Appellant stated he has frequently decided not to cite male drivers for missing license plates. [TR 500]**

9 **A radio dead card demonstrates that Appellant made a stop from 4:54 p.m. to 5:05 p.m. Of course, the dead card does not set forth the details of the stop including the identity of the driver. [Employer Exhibit 6]**

1 **Appellant stressed that he had given his business card to male drivers numerous times. [TR 482]**

11 **There is some controversy regarding whether Appellant took this telephone call when he was either still on-duty or still in his uniform. Brown remembered Appellant saying something to the effect that ". . . he had to get out of his pajamas and change his clothes." [TR 105] Appellant thought that he was putting on his civilian clothes at the time that he took the call. [TR 505, 607]**

12 **Appellant estimated that he spoke with Brown for 30 to 40 minutes while Brown believed that they talked for one and one-half to two hours. [TR 107, 505]**

relationship. [TR 505] Appellant stressed that he was interested in Brown as a friend and ". . . not a relationship way." [TR 628] Appellant felt the invitation simply involved friends getting together. [TR 688, 699] Because he did not think Brown's invitation was a date or a questionable situation, he did not report the invitation to any superior. [TR 608, 610] Appellant acknowledged that, in retrospect, he probably should have reported the invitation. [TR 629]

Appellant and Brown spent one evening in Brown's home conversing, watching television and drinking beer. [TR 113, 517] Brown testified that she told Appellant that she did not want a social relationship. By the end of the evening, Brown decided that she did not want to see Appellant again. [TR 115, 132] Although Appellant called her several times, Brown told him she was busy and he eventually stopped calling. [TR 133-134] Brown emphasized that she did not have any problem with either the lengthy telephone conversation or the evening she spent with Appellant in her home. [TR 125]

Appellant detected that Brown was despondent at the end of their evening together and she asked him if he would call again. [TR 518] He assured her that he would. [TR 518] When Appellant called Brown several days later, she said that her ". . . life was kind of upside down . . . .." [TR 518] Therefore, Appellant concluded that she was not interested in furthering a friendship, and so, he did not call again. [TR 519]

Some months later, Appellant and Officer Buck Flowers responded to a call at the Cramped Corners Motel while Brown was working at the motel coffee shop. [TR 118, 318] Flowers remembered that they said "hi" to each other. [TR 119] Flowers testified that Appellant and Brown waved at each other and Appellant told Flowers that Brown was a friend. [TR 319, 322] Appellant remembered that they waved at each other and he told Flowers that Brown was ". . . someone that I've met. Someone that I know." [TR 519-520]

Appellant had no further contact with Brown. [TR 133]

Vera Violet

Vera Violet, an 18-year-old, attractive woman, was making a delivery to ABC Automobile on behalf of her employer, Action Automobile Parts. [TR 140-141] Violet and Appellant gave substantially differing renditions of what happened next.

Violet testified that after making the delivery, she sat in her Action delivery car filling out her paperwork. [TR 142] When she attempted to back up to depart, she observed a patrol car blocking her exit. [TR 142] The officer, whom Violet later learned was Appellant, remained in the patrol car. He motioned with his hand for Violet to approach the patrol car. [TR 142] Violet walked to the passenger side of the cruiser. [TR 143] Appellant asked Violet about a strip hanging from the rear of the Action delivery car.[13] [TR 145] After Violet told Appellant that the strap was made of rubber, Appellant asked Violet to demonstrate that the strap was rubber by bending it. [TR 41, 46] Violet did so.[14] [TR 146] Addressing Appellant as "sir," Violet asked, "Can I go now, sir?" [TR 147] Appellant replied that it was unnecessary to call him "sir." She should call him "John" and he began "chitchatting." [TR 147-148] Violet

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13 **The Action delivery vehicle, a Yugo, was equipped with a rubber strap hanging from the rear of the car to protect the occupants of the vehicle from a shock. [TR 145]**

14 **Violet testified that, as she bent down to flex the strap, "I was thinking he was getting a look at my butt." [TR 147] Violet conceded that she could not see whether Appellant focused on her behind when she bent over to touch the strap. [TR 165-166]**

replied that, because she had been in the military, she was accustomed to using "sir" to signify respect for a person in uniform. However, Violet also called another police officer "a jerk." [TR 147, 166] Violet further related that Appellant said that her military service was good preparation for a law enforcement career. Next, he asked her if she was interested in police work. [TR 148, 169] Violet responded that she did not think she was physically qualified for a police position inasmuch as she had been medically discharged from the military. According to Violet, Appellant declared that she could obtain a job as an operator or a dispatcher. [TR 148] Then, Appellant told Violet that he could get her a job if she was interested. [TR 149] Appellant gave Violet his business card and urged her to call him about the job or ". . . if I just want to talk." [TR 149] Violet testified that after Appellant invited her to call him, Violet said she had to get back to work and Appellant left. [TR 153] Appellant did not issue a ticket to Violet. [TR 149]

Appellant testified that, although he did not block the Action delivery car from leaving, he stopped behind it in ABC's parking lot because he saw something hanging from the bottom of the unoccupied vehicle.[15] [TR 483, 635, 638] When Violet came out of ABC's, she walked up to Appellant and asked him if there was a problem. [TR 483] Appellant denied that he motioned with his hand for Violet to approach him but he acknowledged that he would have called her over to the patrol cruiser. [TR 484] According to Appellant, he assured Violet that there was ". . . no problem . . . .." [TR 484] He asked her about the hanging strap. [TR 485] When she informed Appellant that it was a static strap, Appellant was satisfied and said "fine." [TR 484] Appellant testified that he never asked Violet to bend down and touch the strap. [TR 489] Appellant related that because Violet told him that all cops are "jerks," he tried to strike up a friendly conversation to impress upon her that not all cops are jerks.[16] [TR 492] Since Violet was calling him "sir," Appellant encouraged her to be less formal by calling him ". . . Officer Cop and John . . . .." [TR 487] At first, Appellant could not recall how a law enforcement career became the topic of their conversation but he later testified that Violet first brought up the subject. [TR 487, 639] However, Appellant also reiterated that he did not recall who first mentioned a police career. Appellant related that he told Violet that she would enjoy police work if she had liked the military. [TR 487] Appellant does not recall any discussion about any injury. He also does not recall giving Violet his business card. [TR 487-489]

Violet declared that she immediately recounted the incident with the police officer over the Company radio to her supervisor. Another delivery driver, Edith, overheard the conversation. According to Violet, Edith exclaimed". . . oh, my God. His name wouldn't happen to be John Cop, would it?" [TR 156] Violet declared that Edith then explained that Appellant had "picked up" her roommate (Beth Brown). [TR 154] Violet's employer reported the incident to the Department.

Violet acknowledged that Appellant did not ask her out on a date, did not inquire if she had a boyfriend, did not obtain her telephone number or discuss her personal tastes. [TR 150, 170-171]

Violet asserted that Appellant was "very smiley," "very unprofessional" and "very flirtatious" with her. [TR 152-153] Thus, Violet charged that Appellant ". . . used his position

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15 **Appellant denied that he saw Violet either prior to observing the strap or before she went inside ABC's. Thus, he denied stopping the delivery vehicle because the driver was a woman. [TR 485]**

16 **Appellant perceived that Violet had an "attitude, agitation" toward him. [TR 484]**

to pick up on me and make me feel like I had to stay there and sustain his attention." [TR 183] Violet was very annoyed with Appellant.

Appellant specifically denied that he was trying to pick up Violet. [TR 489] Indeed, Appellant emphasized that, although he was not interviewed about the incident until four months later, in the interim, he never saw Violet or attempted to contact her. [TR 490-491] Appellant asserted that Violet lied when she testified that he required her to bend over and grasp the strap to demonstrate that it was rubber. [TR 567]

Violet had several encounters with law enforcement officers both before and after her interaction with Appellant.

Violet testified that another officer stopped her to inquire about the static strap three or four days before. [TR 180] After she told the officer the strap's function, the officer departed.[1]

Two Utopia police officers, Chuck Puce and Tommy Chartreuse, arrested Violet for possession of methamphetamine and being under the influence of the illegal narcotic. [TR 343; Appellant Exhibit 3] There is some question as to whether the officers asked Violet if she had used the drug "lately" or "recently." [TR 368; Appellant Exhibit 3] According to the arrest report, Violet responded that she had ingested the drug the day before. Chuck initially surmised that this response was untruthful but, based on Appellant's heart rate when she arrived at the jail, Chuck could not state with certainty that she ingested the drug that day. Indeed, he stated that she could have ingested the narcotic up to two days before the arrest. [TR 351, 355] Chartreuse testified that, at first, Violet denied using methamphetamine. However, after he confronted her, she admitted to using the drug. [TR 367-368, 377] In Chartreuse's opinion, Violet was cooperative, remorseful, honest and trustworthy. [TR 372-373] Violet testified that her arrest was a positive experience for her because she went in a drug diversion program. [TR 200-201] Violet specifically denied that she lied to the arresting officers. [TR 177]

Utopia Police Officer Carl Crimson testified that Violet flagged him down one day and charged that some guys had unsuccessfully incited her to race and then, battered her. [TR 327] The men claimed that Violet hit them.[2] Crimson arrested the men for driving under the influence but did not pursue battery charges. [TR 326] Crimson could not determine which battery allegation was more credible. [TR 328, 337] However, Crimson opined that Violet was not completely accurate. [TR 336]

Susie Scarlet[3]

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1 **Violet asserted that Appellant should have driven away after learning the strap was rubber just as this officer did. [TR 179-180]**

2 **Crimson thought the men had tried to pickup Violet and her female friend. [TR 327] Violet denied telling the officer that the men tried to pick her up. [TR 184]**

3 **Over the Association's vigorous objection, the Arbitrator permitted the Employer to proffer evidence concerning Appellant's purported interactions with Susie Scarlet. The Employer concedes that it did not predicate the instant discharge on the evidence surrounding Susie Scarlet. [TR 290] At the hearing, the Arbitrator ruled that the Employer could not use this evidence to support a finding that it had just cause to terminate Appellant. The Arbitrator reserved ruling on the Association's objection to exclude the evidence from the record pending arguments by the parties. More specifically, the Union contends that the evidence is prejudicial, irrelevant, improper habit or character evidence and immaterial. The Employer seeks to use the evidence to show a pattern of behavior or a method of operation, i.e., *modus operandi*, by which Appellant uses his official position to contact attractive women. [See California Evidence Code § 1101(b).]**

Susie Scarlet testified that, one evening after 9:00 p.m., a police officer, who Scarlet later identified as Appellant, told her and some of her friends that they had to leave Perfect Park because it was closed. [TR 210-211, 386] Appellant did not have any recollection of expelling Scarlet from Perfect Park. [TR 526]

Scarlet is employed as a shoe clerk at Nickel & Dimes. One day, Scarlet waited on Appellant who chose a pair of boots. [TR 212, 214, 526-527] After Appellant identified himself as a police officer, Scarlet recognized him as the officer who had ejected her from Perfect Park. [TR 388] Scarlet testified that while she was assisting Appellant, he asked her age and what she did on the weekend. [TR 214] Scarlet replied that she was 18 years old and, in a sarcastic voice, said she cooked and cleaned on the weekends. [TR 214] Scarlet declared that Appellant then remarked, "I bet you go to bars." [TR 215] Scarlet said no. [TR 215] Scarlet remembers Appellant saying that he ". . . could use a home-cooked meal" and ". . . he needed a good lasagna." [TR 215] Scarlet stated that the conversation was friendly. She perceived that Appellant was flirting with her. [TR 216]

While Appellant agreed with Scarlet that they flirted, he had a somewhat different version of how the discussion proceeded. [TR 529] Appellant recalled that Scarlet asked him if he worked for the Police Department and he initially said, "No."[20] [TR 527] However, when Scarlet told him that she recognized him from Perfect Park, he admitted that he was a police officer. [TR 527-528] Scarlet asked Appellant if he was married and he responded that he was divorced. [TR 527-528] Scarlet then asked him what he missed most about being married and Appellant responded ". . . a normal home-cooked meal every once in a while . . . .." [TR 528] Appellant said that Scarlet offered that she was a good cook and so, he asked her if she could make lasagna and she responded affirmatively. [TR 528-529] Appellant stated that he did ask Scarlet her age and he jokingly remarked that she should not sneak into bars because he would bust her now that he knew her age. [TR 530]

Both Scarlet and Appellant testified that Scarlet asked Appellant if he knew another member of the police force, Sergeant. Ernie Bilko.[21] [TR 217, 530] Appellant and Scarlet testified that Appellant asked her not to mention to Sergeant. Bilko that they met because, as Scarlet remembered Appellant saying, ". . . I'd like to keep my professional life separate from my personal life . . . .."[22] [TR 217, 530]

Because Nickel & Dimes did not have the boots in his size, Appellant had to take a rain check for the boots. [TR 218, 527] Appellant claimed that when he later returned to Nickel & Dimes, it had no record of his back order and he reordered the boots. [TR 664] When he later purchased the boots, Appellant observed Scarlet run to the back of the store. [TR 665-666; Appellant Exhibit 8]

Appellant insisted that he never tried to contact Scarlet and he never thought of her again. [TR 532-534]

Contrarily, Scarlet was certain that Appellant, in uniform and driving a police cruiser,

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20 **Appellant explained that he does not like to discuss his employment with strangers because he may have done something to them.**

21 **Scarlet is friends with Sgt. Bilko's son, Vince. [TR 399]**

22 **Appellant opined that Bilko disliked him because Bilko ostensibly did not welcome him back to work upon his reinstatement. [TR 530-531]**

stopped Scarlet between 8:00 a.m. and 8:15 a.m. one day about a month after the Nickel & Dimes encounter on Porch Optimum Boulevard just as she came out of her residential enclave.[23] [TR 221] Scarlet was absolutely certain that the officer who stopped her was Appellant.[24] [TR 412] Scarlet related that, when Appellant came to her driver's side window, he said (in a laughing manner) "I figured we would meet this way sooner or later." [TR 223-224] Scarlet asked Appellant if she was speeding and Appellant said ". . . I was right." [TR 224] Scarlet told Appellant she was in a hurry to pickup her boyfriend and Appellant replied, "I should have known a girl like you would have a boyfriend." [TR 224] Scarlet declared that Appellant next asked her why she had never cooked lasagna for him. [TR 224] Scarlet informed Appellant that she never looked at his telephone number on the rain check. [TR 225] According to Scarlet, Appellant let her go without issuing her any citation. [TR 226]

Appellant related that he was scheduled to appear in court at 9:00 a.m. that day. When he called the District Attorney's office, the District Attorney excused him from testifying.[25] [TR 534; Employer Exhibit 15] Appellant emphatically asserted that he never left his house that morning. [TR 535] Appellant specifically denied that he sat in a Department patrol car and waited for Scarlet to drive out of her residential subdivision. [TR 679; Employer Exhibit 18]

Scarlet did not personally file a complaint against Appellant because, although annoyed, she did not have a problem with the traffic stop. [TR 458, 465] Nevertheless, Scarlet reported the stop to her boyfriend who conveyed the information to Vince Bilko, who in turn, told his father. Sergeant. Bilko communicated the information to Lieutenant. Bill Bigshot.[26] [TR 227, 741] Later in the day, on Bilko called Scarlet to alert her that Bigshot intended to interview her and advised her to tell Bigshot the truth because ". . . this is not the first time something like this had happened . . . .." [TR 743] Scarlet recalled that Bilko did not say why Bigshot was investigating the traffic stop but Bilko insinuated that, due to prior matters, it was important for her to speak to Bigshot. [TR 434, 435]

Lieutenant. Bigshot twice interviewed Scarlet but he did not sustain any charges against Appellant because he resolved Scarlet' word versus Appellant's word by giving Appellant ". . . the benefit of the doubt . . . .." [TR 246; Appellant Exhibit 1] After Bigshot learned of the Violet and Brown incidents, he sought to reverse his findings from "not sustained" to "sustained" even though he was unable to produce any evidence that Appellant gained possession of a police cruiser on the morning of November 5 and he was unable to find an eyewitness who observed Appellant in the station that morning. [TR 242, 274; Appellant Exhibit 1] Bigshot speculated that Appellant could put on his uniform and take a patrol car without a sergeant's knowledge although the sergeant on-duty on that morning told Bigshot that Appellant did not possess a patrol car. [TR 242] Bigshot also related that there is no record of

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23 **To exit her subdivision, Scarlet must traverse Omelette Drive to Quartz Hill Road. [TR 221; Appellant's Exhibit 6]**

24 **At the time, Appellant worked on the swing shift, not the day shift. [TR 238]**

25 **The time records indicate that Appellant claimed three hours of minimum overtime for his canceled court appearance. [Employer Exhibit 15]**

26 **Sgt. Bilko testified that his son told him that Appellant stopped Scarlet and was ". . . hitting on her . . . .." [TR 741] Scarlet remembered that Vince Bilko had once described Appellant with a slang term to the effect that Appellant was a "womanizer." [TR 401]**

any other officer making a traffic stop at the time and place of the alleged Scarlet' stop. [TR 281] Bigshot acknowledged that it is possible that a police officer stopped Scarlet but did not call the stop into the dispatcher. [TR 282] Although Bigshot believes that Appellant pulled over Scarlet, he could not produce any evidence showing that Appellant tried to contact Scarlet between the date of the alleged stop and the date that Appellant was informed of the internal investigation into his contacts with Scarlet. [TR 289; Employer Exhibit 18]

The Police Chief's Justification for Appellant's Termination

In addition to the seriousness of the charges leveled against Appellant, Chief Blue was particularly worried that Appellant's behavior could expose the City to civil liability. [TR 307] Blue stressed that a police officer may not use his authority to initiate contacts with women.[1] [TR 311] Since the Department had problems with Appellant initiating contacts with women in traffic stops in the past, the Department directed him to tell a supervisor when he had any other than ordinary contact with a female. [TR 307] Blue concluded that Appellant did not do so. [TR 310] Moreover, Blue opined that Appellant engaged in the same misbehavior that Arbitrator McDonald had warned Appellant not to repeat. [TR 304-305]

Therefore, the Employer terminated Appellant. [Employer Exhibit 10]

THE POSITIONS OF THE PARTIES

The Employer's Position

Despite being counseled and warned many times by the Department as well as receiving a final warning from Arbitrator McDonald, Appellant embarked on a pattern of conduct whereby he used his authority to contact, meet and attempt to establish relationships with vulnerable women. Appellant contended that he learned his lesson upon his reinstatement, yet, using various pretexts, he continued to stop pretty women in an attempt to initiate social relationships with them.

Because of his prior misbehavior, the Employer needed him to document all contacts so that the City could protect itself from liability. Appellant disobeyed these instructions. Not once did he contact a supervisor about any traffic stops involving young, attractive, female drivers.

First, looking at the Beth Brown incident, Appellant stopped Brown only after traveling alongside her for over one and one-half miles. He eventually found a pretext to stop her, that is, the missing front license plate. However, one can infer that Appellant was first drawn to this vehicle by the attractive driver and then he manufactured an excuse to stop Brown. It was like reeling in a fish on a hook and line. Once he made the stop, he insured further contact by directing Brown to call him and furnishing his business card. Inasmuch as he did not issue a citation or a fix-it ticket to Brown, the Department was unaware of the stop.

The absence of a citation, the business card and the invitation to call constituted Appellant's *modus operandi* for attempting to meet pretty women. Appellant's scheme succeeded. Brown called Appellant while he was on-duty or at least, he was still partially or fully clothed in his uniform. Yet, the telephone conversation dwelt extensively on personal matters with only a sentence or two about the license plate. Also, Appellant told Brown that he could not ask her out but she could properly ask him out. This shows Appellant's state of mind to slyly maneuver an end run around the instructions given to him by Lts. Mauve and

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1 **Lt. Bigshot admitted that the City never reviewed Appellant's stops of male drivers. [TR 264]**

Watermelon. Appellant established deniability, that is, he could deny that he asked Brown out on a date. However, his actions belie his words because Appellant was clearly the pursuer by suggesting to Brown that she ask him out. Brown characterized their evening at her home as a date while Appellant invented a tortured definition of a date again to attempt to get around the instruction that he report such contacts with women to his supervisor.

The Brown incident demonstrates that Appellant combines patrol duty with picking up women. A police officer must not use his official position to solicit female contacts even if the contacts occur off-duty. *Jackson v. Howell*, 577 F. Supp. 47 (WD MI 1983).

Appellant was also dishonest about his contacts with Brown. Appellant lied when he denied asking Brown to call him and Brown confirmed that Appellant directed her to call him after she went to DMV. His dishonesty renders Appellant wholly untrustworthy.

Under the doctrine of *respondeant superior*, the City is liable for Appellant's behavior especially since the City is fully aware of his pattern of conduct to seek out attractive women driving alone. Moreover, Appellant's abuse of authority raises a much greater risk of liability both in terms of the quantum of damage as well as increasing the likelihood that his next stop of a pretty woman will be the woman that turns into a plaintiff. Therefore, it is irrelevant that Brown did not bring a complaint against the City and/or Appellant.

Looking next at Vera Violet, Appellant again utilized his powerful position as a police officer by blocking her way and initiating a conversation that had nothing to do with his purported purpose for stopping Violet. As Violet asserted, she was reluctant to walk away from Appellant because she felt forced to respond to questions from a police officer. Appellant's conduct should have mirrored the procedures followed by the officer who had stopped Violet four days before. After Violet explained that the strap was a rubber static protector that officer left. Instead of accepting her explanation that the strap was rubber, Appellant told Violet to bend over and touch the strap. Appellant lewdly watched Violet's butt and then he initiated a personal conversation during which he gave Violet his ubiquitous business card. Violet was annoyed and felt used. She immediately reported the incident to her employer. Appellant's reputation in the community is so poor that another female delivery driver identified him (without any physical description), after hearing Violet relate his behavior at ABC's. Put simply, Appellant was trying to pick up another Brown woman while on-duty. He engaged in the same behavior as with Beth Brown. But, this time, the woman was uninterested and complained.

Appellant tried to impeach Violet but she did not have any motive to lie. The officers who arrested her on the drug charges testified that she was apologetic, remorseful and truthful. There was a misunderstanding concerning the content of the question about when she had used an illegal narcotic. With regard to Violet's assault and battery allegation against the men who wanted her to race, the officer was unable to resolve the conflicting assertions made by Violet and the men but this does not mean that Violet lacks any credibility. Finally, the evidence is insufficient to jump to the assumption that Violet holds a vendetta against law enforcement officers.

Like Violet, Scarlet did not have any reason to fabricate a traffic stop to get Appellant in trouble. The Scarlet' evidence is corroborative. It confirms a pattern of behavior whereby Appellant uses his position to initiate relationships with women.

At Nickel & Dimes, Appellant wrote his telephone number on the rain check expecting Scarlet to call him with an invitation for a home-cooked, lasagna dinner.[28] When the invitation

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28 **The City does not have any problem with Appellant's behavior at Nickel & Dimes except that it laid the**

did not materialize, Appellant concocted a reason for meeting Scarlet again. He donned his uniform, borrowed a patrol car and sat outside Scarlet' residential subdivision waiting for her to exit. As with the other stops, Appellant used a pretext (speeding) to pull Scarlet over and then not issue a ticket. This time, Appellant wanted to leave no record of the traffic stop, not only because he lacked any intent to report the contact to his supervisors but to also conceal his misuse of a patrol car. Inasmuch as Scarlet knew Appellant from Perfect Park and Nickel & Dimes, her identification of Appellant as the officer that stopped her is incontestable. The Department does not have a record of any other officer making a stop in the area at that time. While Appellant did not subsequently try to contact Scarlet either on- or off-duty, he learned during the traffic stop that she had a boyfriend which thwarted his romantic inclinations.

Finally, it would be foolhardy for Appellant to argue that Sergeant Bilko and Susie Scarlet made up the Porch Optimum Boulevard incident to harm Appellant. Before she told her boyfriend about the episode, Scarlet had no knowledge about Appellant's checkered background. Therefore, Bilko did not plant any bias in Scarlet' mind when he told her that this was not the first time something like this had happened since she had already informed her boyfriend about the episode.

Because they work under little direct supervision and wield enormous power, police officers are held to a higher standard of conduct than other public employees. *Ackerman v. State Personnel Board* 145 Cal.App.3d 395 (1983). Peace officers must constantly show that they are worthy of the great trust placed in them by the City and its citizenship. Conversely, breaching this trust is a serious concern. Dishonesty by one holding the public trust is intolerable. *Wilson v. State Personnel Board*, (1976) 58 Cal.App.3d 865.

Also, Appellant's pattern of behavior involving moral turpitude could hinder the prosecution of a guilty perpetrator. Counsel for future defendants could seek access to the complaints against Appellant to impeach an investigation as well as to disparage the reputation of the Department.

The City would be negligent if it retained Appellant in its employ. Appellant's numerous offenses show that he is a likely recidivist. Thus, his behavior cannot be corrected with a lesser level of discipline. Termination is the only way to protect the citizens and eliminate the City's liability exposure. The City had an obligation to weed out a bad peace officer. It did so.

<u>The Appellant's Position</u>

Appellant urges the Arbitrator to disregard the Scarlet' evidence because not only is it uncharged misconduct but it is also improper character evidence. The Department improperly implies that since Appellant committed some misconduct with Scarlet, he must have committed the same misconduct with Brown and Violet. California Evidence Code § 1101(a) excludes such evidence because it is prejudicial and unreliable. Therefore, Scarlet' testimony cannot be admitted to prove that Appellant had the propensity to act in a certain manner vis-a-vi, Brown and Violet.

Assuming *arguendo*, that the Scarlet' evidence is admitted into the record, the Employer must demonstrate that Appellant's contact with Scarlet was part of a pattern having common features to his conduct with Violet and Brown. The Employer has failed to demonstrate any commonality. If Scarlet is to be believed, Appellant went to work on his time off, lay in wait for

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foundation for the later contact when Appellant was in uniform.

Scarlet and then pulled her over solely to receive a lasagna dinner invitation. Such an outrageous allegation did not arise in either the Brown or Violet stops when Appellant had legitimate reasons for stopping the two drivers during his regular shift. Also, Appellant never tried to contact Scarlet after the alleged stop. Appellant did not call her. Thus, unlike Brown, Appellant did not have an off-duty contact with Scarlet following an on-duty contact. The absence of such contacts shows that Appellant had no interest in Scarlet. Thus, he never stopped her in his uniform. Finally, the Employer did not bring forward any proof that Appellant ever left his home she claims that Appellant stopped her.

Moreover, the Employer cannot find any fault with Appellant's contact with Scarlet at Nickel & Dimes. He was off-duty when he purchased a pair of boots and had a pleasant conversation with the saleswoman. It is ludicrous for the Employer to compel Appellant to report every interaction Appellant has with women during his daily activities especially if he is off-duty.

Next, Scarlet never went directly to the Department to complain about the alleged traffic stop. Bilko, who dislikes Appellant, escalated the phantom traffic stop into an Internal Affairs investigation in an effort to get Appellant.

The Employer's regulation of Appellant's contacts with women is unconstitutional. The Employer's intrusion into Appellant's personal life and personal relationships violates his constitutional privacy rights and his constitutionally protected freedom of association. In addition, the Employer's regulations were unconstitutionally vague.

Appellant has the right to engage in intimate associations and relationships free from the state's (Employer's) interference. *Roberts v. United States Jaycees,* 468 U.S. 609 (1984). A police officer does not waive these freedoms merely because he becomes a law enforcement official. *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983). In *Thorne*, the court ruled that a police department may not delve into a potential employee's private life and friendships. Any regulation of off-duty activities must be carefully tailored to meet a compelling interest of the employer. *Thorne* prohibits the Employer from making a boundless intrusion into Appellant's freedom of association since the regulation essentially prevented Appellant from having any contact with women. The Employer's discipline and Arbitrator McDonald's decision are unlawful attempts to regulate with whom Appellant associates.

If the Employer is truly concerned that Appellant is abusing his police powers so that the Employer cannot trust him, the regulation is vague and overly broad. It improperly forbids Appellant from meeting any female, under any circumstances, while at work or at home. It is a "catch-all" policy without defining the specific, prohibited misconduct. Both the Watermelon and Mauve memorandums are too broad to be enforceable. "Questionable situations" and "dating relationships" are vague phrases forcing Appellant to guess at what conduct is permissible and what conduct is impermissible. Appellant was in a quandary. Could he stop a female driver while on-duty? Could he be friends with a woman while off-duty? Could he interact with women while on-duty at other than traffic stops? What is a date? What is a questionable situation? He simply did not know what contacts to report to his supervisor.

Moreover, the Employer cannot control what Appellant does on his own time.[29]

As in *Thorne*, Appellant's off-duty relationships with men and women are within the zone of privacy protected by the penumbra of the Constitution. A public employer may not

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29 **At some point in time, Appellant is free of the Employer's control. The Employer cannot regulate a worker 24 hours a day, every day of the year. The regulation is overly broad.**

intrude into the private affairs of its employees. If taken to the extreme, the Employer could even regulate who Appellant married. Put simply, his associations with women are none of the Department's business. The Employer had no compelling interest in Appellant's interactions with Brown while he was off-duty and the vague guidelines would not alert him that he did anything wrong with Violet.

For example, Appellant had a legitimate reason for stopping Beth Brown and he had a legitimate inquiry for stopping Vera Violet. Appellant never utilized information from either stop to meet either woman. Indeed, he had no contact with Violet after the strap incident. The guidelines given to Appellant by the Employer were too vague for Appellant to understand that he must report a simple, pleasant conversation about a law enforcement career. Brown's and Appellant's evening together was within the zone of privacy. The Employer never articulated why it needed to know about this off-duty activity especially since Brown never complained.

Since the Employer's regulation of Appellant's conduct is unconstitutional, the Employer is forbidden from using disciplinary sanctions to enforce any alleged violation of the regulations.

Nevertheless, Appellant did not do anything wrong. It is important to keep in mind that Appellant is charged with misconduct different than the infractions for which he was disciplined in the case presented to Arbitrator McDonald. Indeed, Arbitrator McDonald exonerated Appellant of using his on-duty position to initiate contacts with women for the purpose of developing off-duty relationships.

During the Brown stop, Appellant was a complete professional. Brown confirmed that Appellant was businesslike and they did not discuss any personal subjects. Appellant did not utilize any information he gained from the traffic stop to develop an off-duty contact with Brown. To the contrary, Brown called Appellant. More notably, Brown's off-duty call to Appellant did not lead to a dating relationship. They met once at Brown's home and never had any significant contact with each other again. Since Appellant did not establish a dating relationship with Brown, he was not under any obligation to report the contact to a superior.

Violet was predisposed against Appellant because she considers police officers to be "jerks." Moreover, she was annoyed that she had to, for the second time in four days, explain the purpose of the strap to a City police officer. Besides her petty annoyance with cops, Violet experienced unpleasant encounters with police officers in the past. She was arrested for possession and use of drugs. Violet lied to the arresting officers about when she ingested the drugs. Officer Crimson did not believe her assault charge in the racing incident. Violet took out her grudge against police officers by exaggerating what actually occurred on May 21, 1997. Since Violet lacks credibility, her testimony cannot implicate Appellant.

Finally, Violet, as opposed to Appellant, brought up the personal matter, that is, she had recently been in the military which naturally led to a discussion about a law enforcement career. Appellant's efforts to be friendly, helpful and pleasant are being twisted by the Employer into something immoral and improper.

While Arbitrator McDonald gave Appellant a firm warning, the admonition concerned misconduct that Arbitrator McDonald had found Appellant guilty of committing. To reiterate, Arbitrator McDonald did not find Appellant guilty of using his police officer position to initiate contacts with women. Therefore, Arbitrator McDonald's warning is irrelevant to this proceeding.

DISCUSSION

The Scarlet Evidence

After carefully considering the parties' arguments, the Arbitrator grants Appellant's motion to strike from the record all evidence concerning the alleged contacts between Appellant and Susie Scarlet. While the evidence tends to show a pattern of actions or a *modus operandi* by Appellant, the probative value of the evidence is heavily outweighed by both the prejudicial nature of the evidence and the overall reliability of the evidence. Thus, the motion to strike is granted on the grounds that the Scarlet' evidence is immaterial and, to the extent that it shows a consistent course of conduct by Appellant, the evidence is highly prejudicial.

First, the pattern, itself, is somewhat tenuous. The common threads flowing through the Beth Brown and Vera Violet incidents are missing from the Susie Scarlet' incident. The only similarities, assuming Scarlet is a credible witness, is Appellant using his authority as a police officer, without issuing a citation, to either initiate or further a contact with an attractive, young woman.[30] Most of the specific factors which might demonstrate a scheme, plan or pattern in the matters involving Brown and Violet were not present when Appellant interacted with Scarlet. For example, Appellant did not offer his business card to Scarlet either at Nickel & Dimes or at the alleged traffic stop. While the Employer argues that marking his telephone number on the Nickel & Dimes' rain check was equivalent to tendering his card to Scarlet, his business card, with the Police Department's insignia, is much more impressive. Another disparity is that Appellant ostensibly urged Brown and Violet to call him while he did not directly encourage Scarlet to call him. Appellant did not suggest that Scarlet call him at the alleged traffic stop.[31] It is too speculative to conclude that following the alleged traffic stop, Appellant expected Scarlet to contact him without his asking her to call. Therefore, the Scarlet evidence, on the one hand, and the Violet and Brown incidents, on the other hand, are not sufficiently similar to discern a consistent, unequivocal pattern of conduct.

Second, the reliability of the Scarlet' evidence rests entirely on Scarlet' credibility.[32] If she is truthful, Appellant committed a heinous offense because he not only illegally stalked Scarlet but he also misappropriated City equipment and improperly used his uniform while off-duty to further his selfish interests. Since this alleged offense is uncharged misconduct, the serious nature of the alleged offense renders it highly prejudicial. Due process dictates that the Employer must sustain charges of grave misconduct rather than exonerating Appellant and then resurrecting the charges in a belated effort to impugn his character. The charge is so grave that the modicum of probative value of the evidence is outweighed by the prejudicial effect of the evidence.

Therefore, in reaching the decision herein, the Arbitrator disregarded the evidence surrounding Susie Scarlet.

The Nature of the Charged Misconduct

Insubordination is a subordinate's failure to obey a supervisor's direct order. To prove

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30 **With regard to Brown, Appellant allegedly had an initial contact with a woman on-duty in attempt to foment an off-duty relationship. As to Scarlet, Appellant's initial, meaningful contact (they were not introduced to each other at Perfect Park) with her was off-duty and he then allegedly used an official (albeit Appellant was not on duty) contact to further a relationship with Scarlet. The commonality is Appellant's alleged use of his official position and power to initiate or further an off-duty relationship with a woman.**

31 **Instead, according to Scarlet, on Appellant asked her why she had not called him.**

32 **The Arbitrator emphasizes that he did not consider or pass judgment on the credibility of Susie Scarlet.**

that Appellant committed insubordination, the Employer must show that a supervisor issued a direct order; the order was adequately communicated to Appellant so that he understood it as a direct order; Appellant either disregarded or disobeyed the order; and, the Employer gave Appellant reasonable time to comply with the order. It is critical that police officers follow their supervisor's orders. Disobedience of orders leads to a breakdown in the paramilitary structure of the police department and, in some instances, imperils the safety of officers and the public. There are some very narrow exceptions when an officer may disobey an order without disciplinary sanctions. Later, in this Opinion, the Arbitrator will address whether the orders are unenforceable because they violated Appellant's constitutional rights.

In this case, the Employer issued Appellant several direct orders. As early as (well before the first termination), Lt. Mauve unequivocally instructed Appellant to report to his supervisor whenever Appellant came upon a questionable situation involving a female because inferences were arising that Appellant had been stopping female drivers for violations solely to make contact with the women. Mauve was concerned that Appellant might be engaged in inappropriate behavior but, even if untrue, Mauve wanted to protect Appellant from unwarranted perceptions that Appellant was abusing his authority to meet attractive women.

Watermelon reiterated Mauve's instructions and expanded the instructions by directing Appellant to contact a supervisor whenever there might be any "doubt" regarding his contact with a female especially if it turned into a dating relationship. Lt. Watermelon also ordered Appellant to conduct himself in a "businesslike and professional" fashion during all on-duty contacts with women.

Watermelon's instructions came after Appellant was charged with stopping a woman while on-duty for an unregistered vehicle, failing to give her a citation and then spending at least one evening with her while off-duty. Since the instruction evolved from this factual situation, Appellant could not misunderstand the nature of the instruction. Stated differently, Watermelon clearly conveyed to Appellant that if a similar or identical situation developed, he should contact a supervisor.

It is important to analyze the scope of these instructions. The orders did not prohibit Appellant from stopping female drivers for legitimate law enforcement purposes. The instructions did not bar Appellant from meeting women while on-duty or off-duty. The instructions did not even forbid Appellant from contacting a woman off-duty that he had initially met while on-duty. But, the orders stated that Appellant had to disclose the on-duty contacts with women which were questionable or other than businesslike and any off-duty contacts with women that were linked to an on-duty contact. Thus, the instructions were narrowly restricted to a reporting requirement.

Besides express instructions, Appellant received several warnings cautioning him about his on-duty contacts with women and any consequences of failing to report his activities. Watermelon warned Appellant that he should resolve any doubt about a contact with a female by reporting the contact. Next, although Arbitrator McDonald did not find that Appellant had stopped female drivers while on-duty to initiate off-duty contacts, he did conclude that Appellant was dishonest and insubordinate. The substance of the insubordination charge in this case may be different from the instructions which Appellant disregarded (and led to his termination) but, the offense is the same. Therefore, Arbitrator McDonald's final warning that, Appellant must strictly comply with orders issued by his superiors or face discharge, applies to the insubordination charge herein.

The Department also alleges that Appellant committed conduct unbecoming a peace

officer. Certainly, a peace officer cannot use either his authority or his uniform for an objective unrelated to a law enforcement purpose. This creates the conflict of interest prohibited by Section C1 of the personnel policy.

Next, this case involves whether Appellant was truthful about his interactions with Brown and Violet. If he misrepresented or gave false statements, he is guilty of dishonesty. Arbitrator McDonald found Appellant had been dishonest and so, he knew the Department would not tolerate any more concealment or misrepresentations. In addition, the Department reprimanded Appellant for falsely representing a ride-along-citizen as a police investigator.

Thus, the question becomes, did Appellant commit insubordination, dishonesty and/or conduct unbecoming a peace officer with regard to either Beth Brown and/or Vera Violet?

Beth Brown

The facts surrounding Appellant's contacts with Beth Brown are parallel to the factual situation described in Lieutenant. Watermelon's memorandum. Brown involved an on-duty traffic stop that led to an off-duty date. Watermelon had used the example of Appellant stopping a woman and going out one evening as the kind of situation that Appellant was obligated to report to his supervisor.

The evidence surrounding the Brown traffic stop and the evening Appellant spent with Brown amply demonstrates that Appellant fully realized that this was the type of contact that he needed to report. If Appellant's testimony is credited, he pulled Brown over due to a missing front license plate.[33] At the stop, Appellant was professional and businesslike per Watermelon's directive. However, Appellant's professionalism was marred by his inexplicable failure to give Brown a fix-it ticket. His failure to issue Brown some sort of citation raises the reasonable inference that Appellant did not want an official record of this stop in case a relationship between Appellant and Brown later evolved.[34] This is an instance where Appellant should have been concerned about how his actions might be perceived. To insure that he would not be perceived as having stopped Brown solely to meet her, he either had to issue a citation so that there would be a record of the stop or he had to report to his supervisors that he let an attractive female off without a citation because he felt sorry for her after she underwent a sobriety test. By concealing any record of the stop and by failing to report the stop to a superior, Appellant created the inference that, by the time he gave Brown his business card, he was hoping to have further contacts with Brown. Finally, Appellant could have completely exonerated himself by simply reporting to a superior that he went out on a date with Brown.

Instead, Appellant parsed the instructions and devised a novel, convoluted definition of a date. Appellant attempts to explain his failure to report this incident to his supervisors by saying

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33 **The Employer urges the Arbitrator to draw an inference that the genesis of the traffic stop was the presence of a young, attractive, lone female driver and the missing license plate was the pretext for stopping Brown. The Employer's argument may or may not be valid especially since there is some indication that Appellant followed Brown for some period of time before stopping her. Nevertheless, the Arbitrator can, at most, infer a dual motive for Appellant's actions, that is, he clearly would not have pulled her over but for the missing front license plate but he may not have pulled over a car with a missing license plate driven by an older woman or a male driver. It is simply too speculative to conclude that the sole motive for the stop was to meet Brown. Appellant had a legitimate law enforcement purpose for the stop. Also, as stated earlier herein, the instructions did not ban Appellant from stopping women drivers for legitimate purposes.**

34 **Perhaps, Appellant wanted Brown to feel grateful to him for not issuing her a ticket.**

that Brown asked him out. However, Lieutenant. Watermelon testified that he had told Appellant that he must report the contact even if the woman asks him out. Next, because Watermelon referred to a "dating relationship" in his memo, Appellant seeks to characterize his evening with Brown as something other than a date. One does not need to consult the dictionary to understand that a man and a woman spending an evening in each other's company at a pre-appointed time, as Appellant and Brown did, is a date. Nothing in the vernacular use of the word "date" suggests, as Appellant asserts, that there must be intimacy between the man and woman before spending an evening together can be called a date. Brown called their evening together a date. It was a date.

Brown did not file a complaint against the City or Appellant arising out of the traffic stop or the subsequent date and thus, she does not hold any animus against Appellant. She did not have any motive to lie. Brown testified that, at the traffic stop, Appellant asked her to call him once she had procured new license plates.[35] Therefore, Appellant was dishonest when he represented to the Employer that he did not recall who first suggested a follow-up call or that Brown offered to call him. This misrepresentation is crucial because it shows that Appellant was hoping for some further contact with Brown.

In sum, Appellant committed insubordination and dishonesty with regard to his interactions with Brown.

Vera Violet

With regard to Vera Violet, Appellant initially made a legitimate law enforcement inquiry but the remainder of his interaction with Violet was unprofessional and wholly unrelated to any law enforcement purpose.

The Arbitrator need not decide if Appellant instructed Violet to stoop over and bend the strap hanging from the back of the delivery automobile. Regardless of whether this incident occurred, Appellant deliberately steered the conversation from the legitimate inquiry about the hanging strap to personal matters and Violet reluctantly had to converse with Appellant. After learning that the strap was made of rubber and designed to prevent shocking the occupants of the vehicle, Appellant should have expressed his thanks to Violet and permitted her to leave. Violet asked Appellant if she could leave. Yet, Appellant impeded her departure and diverted the conversation to subjects that he thought might impress Violet. Appellant clearly had something other than law enforcement on the forefront of his mind when he was quizzing Violet about her background and her career interests. Furthermore, Appellant was trying to impress Violet with his power when he told her he could obtain a job for her with the Police Department.[1] Giving Violet his business card was a subtle suggestion that, if she was duly impressed, she should call him.[2]

Appellant abused his authority as a peace officer by requiring a citizen, against her will,

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35 **Also, it is implausible that Appellant would give Brown his business card unless he simultaneously told her to call him.**

1 **This also created the conflict of interest prohibited by Section C1 of the personnel policy. Appellant now had a selfish reason for speaking to Violet (to impress her).**

2 **The business card served no law enforcement purpose. It evinces Appellant's motive. Even according to Appellant's rendition, he gave Violet his card long after the strap inquiry had been answered. It can easily be inferred that he gave his card to her hoping she would call, i.e., to promote a potential, off-duty relationship.**

to engage in a personal conversation with him. She had no choice but to go along with his discussions. He continued to block Violet's exit even after she politely asked him if she could leave. Appellant's conduct was unbecoming to the uniform.

Appellant's excuses are flimsy. If he was truly concerned that Violet was agitated and if he tried to dissuade her from her belief that all cops are jerks, Appellant could have simply said "some officers are nice," explained why he was inquiring about the strap and allowed her to depart.[3] He had no right to intrude into the privacy of her past employment or her career aspirations.

In addition, Appellant was insubordinate because he failed to report this on-duty contact with a female to his superiors. Appellant was obligated, when there was any doubt about the legitimacy of a contact, to report the contact to his superiors. Appellant was also insubordinate because he did not conduct himself in a businesslike and professional fashion during his interaction with Violet. Appellant's rationalization that this was a routine law enforcement stop and he was merely trying to have a pleasant conversation with a citizen is belied by the fact that he hid the contact from his superiors. If he was really concerned about public relations, he would have reported to his superior that he stopped Violet and encouraged her to pursue a law enforcement career. Such a report would have insured Appellant's innocence.

Therefore, with regard to Violet, Appellant committed insubordination and conduct unbecoming a peace officer.

Constitutional Considerations

As Appellant argues, the Employer is barred from enforcing an unconstitutional order. However, the Violet incident did not raise constitutional issues. The City rightly disciplined Appellant for abusing his authority as a peace officer by being unprofessional and unbusinesslike during his interaction with Violet. Stated differently, there was no constitutional impediment to the Employer disciplining Appellant for conduct unbecoming a police officer at ABC's. The constitutional considerations raised by Appellant cut to whether the City could enforce an instruction pertaining to Appellant's off-duty contact with females as well as whether those instructions were vague and overly broad. While on-duty, the Department controlled Appellant. Even Appellant realized that he had no expectations of privacy during his interaction with Violet. Requiring Appellant to report his on-duty activities touch on neither his right of privacy nor his freedom of association.

These constitutional considerations are present in the Brown matter. Nevertheless, the Arbitrator concludes that the Employer's orders to Appellant were constitutionally permissible and the content of the orders was clear and unambiguous.

The Bill of Rights guarantees to individuals the right to form and preserve certain kinds of highly personal relationships in a sanctuary protected by intrusion from the government. *Roberts v. United States Jaycees,* 468 U.S. 609, 618 (1984). The United States Supreme Court observed that protecting personal relationships is central to the concept of one's liberty because of the emotional enrichment an individual engenders from establishing and maintaining close ties with others. [Id. at 619.] An individual does not relinquish any constitutional rights in exchange for gaining employment by the government as a peace officer. *Thorne v. City of El Segundo,* 726 F.2d 459, 469 (9th Cir. 1983). However, the freedom of association is neither

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3 **Ironically, Appellant may have reinforced Violet's negative opinion about police officers.**

absolute nor unlimited. In particular instances, the government has the right to effect a minimal necessary intrusion into personal relationships to protect a compelling state interest. The United States Supreme Court, In *Roberts v. United States Jaycees*, wrote:

> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. [468 U.S. 609, 620]

In addition to analyzing the closeness of the personal relationship, the Supreme Court held that:

> "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[39] [Id. at 623.]

The Ninth Circuit similarly adjudged that a careful examination of the importance of the governmental interest advanced and the extent to which the interest is served by the particular regulation are the essential components in determining the limits of the freedom of association. *Thorne v. City of El Segundo,* 726 F.2d 459, 469 (9th Cir. 1983). In essence, there is a three-pronged analysis for judging whether the state may constitutionally impede or abridge one's freedom of association. First, the kind of relationship is located on a spectrum from the most intimate to the most remote. Second, the regulation must promote a compelling state interest. Third, the regulation must actually operate to achieve that compelling state interest. According to the United States Supreme Court, this analysis involves balancing the first factor with the second and third factors.

In this particular situation, Appellant's relationship with Brown can best be characterized as a single, romantic date. In both prior incidents (the one for which he was reprimanded) and the Brown incident, Appellant went on an off-duty date with a woman after meeting her on-duty via a traffic stop. The off-duty relationships were more than just remote acquaintanceships but, they were certainly not close, enduring and loving relationships. On the spectrum, Appellant's off-duty relationship with Brown was somewhere in the middle. The Department did not intrude into Appellant's family life. Rather, the regulation cut directly to Appellant's dating relationships albeit, the instruction did not prohibit dating relationships.

Next, the Department had a compelling interest to require Appellant to provide the Department with information about his off-duty contacts with females when the contact was linked to an on-duty event. Appellant's prior insubordination and dishonesty manifested that the Department could not trust Appellant's judgment and discretion in his he interactions with women while on-duty where Appellant later interacted with the women while off-duty. Thus, the Employer had to impose a reporting requirement on Appellant. Again, the regulation did not

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39 **In *Roberts v. United States Jaycees,* the Supreme Court held that a state's interest in eradicating gender discrimination outweighed a private association's historical and traditional precepts of admitting only men of a certain age group. Id.**

prohibit his dating relationships. To insulate itself from civil liability, the Department had a compelling interest to establish a process to keep apprized of Appellant's activities. The City's potential liability exposure to a harassment suit brought by a citizen (who did not respond as cordially as Brown to Appellant's advances), justified the Department's imposition of the reporting requirement.

Next, the reporting requirement narrowly operated to achieve the state's interests. It did so with minimal infringement on Appellant's freedom of association. The regulation was carefully tailored to further the Department's compelling interest. Appellant was mandated to tell the Employer what he did as a result of contacting women on-duty. The requirement did not prevent the establishment of associations. Of course, even the reporting regulation had a slightly chilling effect on Appellant's freedom of association. Appellant may think twice about (or even forego) establishing a relationship with a woman when he is obligated to report such activity to his Employer. Under the balancing test, the Department's compelling interest outweighs the minimal infringement on Appellant's freedom of association. When Appellant meets a woman under the power of police authority and then dates the woman off-duty, the relationship is likely to spill over into the workplace. For example, Appellant may have abused his discretion by failing to issue a ticket to Brown. He may have believed that Brown would feel inclined to express some gratitude by rewarding him with a date.

In summary, the Department's order to Appellant, that he report off-duty contacts with women that evolved from on-duty contacts, did not abridge Appellant's constitutional freedom of association. The order was narrowly construed to only slightly impair Appellant's ability to establish relationships because it did not prohibit those relationships and the Department had a compelling state interest to impose the reporting requirement.

Appellant also raises two other constitutional challenges: the right of privacy and that the regulation was unconstitutionally vague. The constitutional right of privacy protects an individual's interest in avoiding public disclosure of personal facts. *Whalen v. Roe,* 429 U.S. 589, 599 (1977). In *Thorne v. City of El Segundo*, the Ninth Circuit ruled that a city police department unwarrantedly intruded into a female applicant's personal life by interrogating her about a prior affair with a married officer in the department and then using this information to exclude the applicant from employment. 726 F.2d 459 (1983). *Thorne* is readily distinguishable from this case. The Employer herein was not inquiring into details of Appellant's sex life. Indeed, to a large extent, the Department directed Appellant to record what should have been public facts, that is, the circumstances surrounding on-duty traffic stops. Appellant can hardly argue that his decision to refrain from issuing citations to females to keep the contact under wraps is constitutionally protected. Moreover, the fact that Appellant may be dating someone that he originally met while on-duty is not such a private, personal matter to trigger the constitutional right of privacy. The Department was not trying to regulate Appellant's morality.[40] The reporting requirement did not invade Appellant's personal space.

Finally, as the Arbitrator already ruled, the Mauve and Watermelon instructions were clear and unambiguous. Only Appellant asserts that the instructions were subject to interpretation to rationalize his unartful attempts to carve loopholes in the instructions or completely circumvent the instructions. A regulation is not vague and ambiguous simply because one asserts that it lacks objective criteria. A regulation is vague and overly broad only if

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40 **However, the Ninth Circuit in *Thorne* implied that a police department may, under certain circumstances, constitutionally consider the sexual morality of its employees. [726 F.2d 459, 470.]**

a person of common intelligence must necessarily guess at its meaning or reasonable persons differ regarding its application. *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). The Department used reasonable clarity in constructing the orders. As the Arbitrator stated earlier in this Opinion, Appellant knew that if there was any hint of impropriety or any doubt about a contact, he should contact his superior. More importantly, with regard to Brown, the circumstances were exactly parallel to the situation for which he had just been reprimanded when not reporting an on-duty to off-duty contact to his supervisor.

In conclusion, the instructions were not unconstitutionally vague.

The Penalty

When Arbitrator McDonald reinstated Appellant to service, Appellant was the recipient of a valuable gift. He was given an opportunity to rehabilitate his career and his reputation. He was provided with the opportunity to demonstrate to the Employer that he could obey orders. Arbitrator McDonald warned Appellant that he could not engage in insubordinate behavior again. Appellant did not take the warning seriously because he was more interested in locating loopholes in the instructions, parsing the language of the instructions and circumventing the instructions so that he could use police authority to contact attractive, young females while on-duty.

However, Appellant did not heed Arbitrator McDonald's warning even as he understood it. Appellant interpreted Arbitrator McDonald's decision as keeping his professional life separate from his personal life. In the Brown incident, there was an inescapable link between the on-duty stop and the subsequent date. At his insistence, Brown called Appellant about the license plate and then (per his suggestion) asked him out. The line between his personal life and professional life was blurred. Stated differently, Appellant created his own predicament by not carefully and cautiously monitoring his own behavior. He should have behaved as if he were walking on eggshells and reported every situation having even a hint of impropriety.

As Chief Blue stated, the City faces enormous potential liability if a police officer harasses a citizen. A harassment suit is more problematic when the police officer's personal agenda is to meet a woman in an attempt to establish an off-duty relationship. The next woman that Appellant stops may not react as nicely as Brown.

Finally, two Arbitrators have now found that Appellant is insubordinate and dishonest (and in addition, this Arbitrator found that he engaged in conduct unbecoming an officer). The Department does not need to maintain in its employ a person who cannot obey direct orders. The Department is a paramilitary organization and it rightly demands that its officers comply with directives. Moreover, Appellant's dishonesty violated the sacred trust between police officers and their Department and between police officers and their community.

The Department proffered evidence proving just cause for terminating Appellant.

AWARD AND ORDER

The appeal of Appellant's termination is denied.

Dated: 1999

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John B. LaRocco
Neutral Arbitrator